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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons why a writ of certiorari should be granted	5
1. The decision of the Court of Appeals conflicts with this Court's decision in Geduldig v. Aiello, 417 U.S. 484	5
2. The decision of the Court of Appeals involves an important question of federal law which is already pending before this court	7
3. This case presents an important question of Federal Court jurisdiction under Title VII of the Civil Rights Act which should be settled by this Court	8
Conclusion	10

Appendices

	Page
Appendix A—Ninth Circuit Court of Appeals opinion	1
Appendix B—Hutchison v. Lake Oswego School District No. 7	12
Appendix C—District Court opinions and judgment	30
Appendix D—Statutes involved	48
Appendix E—M. Thebaut, M.D. affidavit and Richmond District policy	55

Table of Authorities Cited

Cases

	Pages
Geduldig v. Aiello, 417 U.S. 484 (1974)	5, 6, 7
General Electric Company v. Gilbert, Nos. 74-1589, 74-1590, cert. granted Oct. 6, 1975	7
Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975)	6, 7, 8
Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961 (9th Cir. 1975)	2, 5, 6, 7, 8, 9
Lake Oswego School District No. 7 v. Hutchison, No. 75-568, filed Oct. 10, 1975	6
Liberty Mutual Insurance Company v. Wetzel, No. 75-1245, cert. granted 421 U.S. 987	5, 7
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	8, 9
Minneapolis & St.L.R. Co. v. Peoria & P.U.R. Co., 270 U.S. 580 (1926)	10
National Labor Rel. Bd. v. Atlantic Metallic Casket Co., 205 F.2d 931 (5th Cir. 1953)	10
Royalty Service Corp. v. City of Los Angeles, 98 F.2d 551 (9th Cir. 1938)	10
Wetzel v. Liberty Mutual Insurance Company, 511 F.2d 199 (3rd Cir. 1957)	5, 7, 8, 9

Codes

United States Code:	
28 U.S.C. §1254(1)	2
28 U.S.C. §1331	4
28 U.S.C. §1343(3)	4
42 U.S.C. §1981	4
42 U.S.C. §1983	4
42 U.S.C. §2000e, et seq.	4
42 U.S.C. §2000e-2(a)	3
42 U.S.C. §2000e-5(a)	9
42 U.S.C. §2000e-5(b)	3, 4
42 U.S.C. §2000-5(f)	4
42 U.S.C. §2000e-5(f)(1)	3

California Education Code: Pages
§13456 .....3, 6, 8
§13468 3

Constitutions

United States Constitution:
Fourteenth Amendment 4, 6, 7

Other Authorities

29 C.F.R. §1604.10(b) 3
Title VII Civil Rights Act 2, 4, 5, 6, 7, 8, 9

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SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 9, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in ..... F.2d ....., and is appended to this petition as Appendix A. The decision of the United States Court of Appeals for the Ninth Circuit in *Hutchison v. Lake Oswego School District No. 7* is reported in 519 F.2d 961 and is appended to this petition as Appendix B. The opinions and the judgment of District Judge Alfonso J. Zirpoli are appended to this petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on December 9, 1975, and this petition for certiorari was filed within 90 days of that date. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act must an employer pay sick leave for absences due to normal pregnancy and delivery?

2. Under Title VII of the Civil Rights Act is an employer prevented from making a factual, medically based determination as to the ability of a pregnant employee to continue working?

3. May an action under Title VII be maintained notwithstanding (1) that the statutory notice of

the right to sue had not been received when the action was filed and (2) that the underlying EEOC charge was defective.

STATUTES INVOLVED

The primary statutes and regulations concerned in this case are 42 U.S.C. §2000e-2(a), 42 U.S.C. §2000e-5(b), 42 U.S.C. §2000e-5(f)(1), 29 C.F.R. §1604.10(b), California Education Code §13456, and California Education Code §13468. The text of these statutes and regulations is appended to this petition as Appendix D.

STATEMENT OF THE CASE

Sonja Lynn Berg was a school teacher employed by the defendant Richmond Unified School District. On December 14, 1972 she notified the District that she was pregnant, that her child was expected to be born on March 24, 1973, and that she requested a pregnancy leave of absence to begin on February 23, 1973, one month before the expected date of delivery (CR 4, 26). On December 20, 1972, Mrs. Berg submitted a further request supported by a statement from her personal physician, that her pregnancy leave begin on March 23, 1973, one day before her expected delivery date (CR 15-16). The District requested that Mrs. Berg have a physical examination by a doctor appointed by the District (CR 18, 27). By a letter from her attorney, Mrs. Berg refused a physical examination (CR 19-22).

One month before her initial leave request, Mrs. Berg had filed an EEOC charge against the District alleging sex discrimination. This charge was not under oath as required by 42 U.S.C. §2000e-5(b) (CR 255). On February 5, 1973 this action was filed in the District Court (CR 1) as a class action based on 42 U.S.C. §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §§2000e, et seq. Jurisdiction was invoked under 28 U.S.C. §§1331 and 1343(3) and under 42 U.S.C. §2000e-5(f) (CR 1).

In opposition to Mrs. Berg's motion for a preliminary injunction the District obtained a medical opinion on the subject of employment for pregnant teachers during the late period of their pregnancy, and adopted a revised "interim" maternity leave policy (CR 44-54). Copies of the affidavit of Maxwell Thebaut, M.D., and of the Richmond Unified School District Interim Maternity Leave Policy are appended to this petition as Appendix E.

The Trial Court issued a preliminary injunction on February 22, 1973, and Mrs. Berg continued teaching until the day before her child was born (CR 71, 231).

On May 14, 1973, Judge Zirpoli granted Mrs. Berg's motion to file a supplement to her complaint alleging that the Department of Justice had issued a right to sue notice on February 21, 1973 (CR 197).

Ultimately, the Trial Court certified a class and granted Mrs. Berg a summary judgment on her Title VII claims, (a) enjoining defendants from denying

Mrs. Berg accumulated sick leave compensation for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery and (b) enjoining defendants from adopting or enforcing policies on commencement and duration of leave, reinstatement and payment of sick leave which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities (CR 326, 327). The judgment of the Trial Court was affirmed by the Ninth Circuit Court of Appeals on the authority of *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir. 1975) and *Wetzel v. Liberty Mutual Insurance Company*, 511 F.2d 199 (3rd Cir. 1975), cert. granted, 421 U.S. 987 (1975) (Appendix A).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN GEDULDIG v. AIELLO, 417 U.S. 484.

The ruling of the Court of Appeals on the merits in this case is that the School District's exclusion of normal pregnancy or childbirth related disabilities from sick leave coverage, and its policy reserving final discretion to compel pregnancy leave violated Title VII of the Civil Rights Act. But in *Geduldig v. Aiello, supra*, this Court stated:

> "Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving preg-

nancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

417 U.S. 484, 496-497, incl. fn. 20, in part.

During the time that this action was pending in the lower courts, California Education Code §13456 specifically authorized school districts to provide for leave of absence due to normal pregnancy, without pay.

In *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, supra, the Ninth Circuit Court of Appeals held that this Court's decision in *Geduldig v. Aiello* was limited to actions under the Fourteenth Amendment and was inapplicable to actions based on Title VII. Over the dissent of Judge Schnacke, the Court of Appeals ruled that a school district sick leave policy excluding pregnancy and childbirth disabilities violates Title VII. A petition for certiorari is pending from that decision (*Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, filed October 10, 1975). The decision of the Court of Appeals in this action is based expressly upon its previous decision in the *Hutchison* case.

Judge Schnacke dissented from *Hutchison* on the ground that this Court's holding in *Geduldig v. Aiello* was controlling and contrary to the decision of the Court of Appeals, 519 F.2d 961 at 968. See also the dissent of Judge Widener in *Gilbert v. General Electric Company,* 519 F.2d 661 at 668 (4th Cir. 1975) cert. granted No. 74-1589, 74-1590, October 6, 1975, sub nom. *General Electric Co. v. Gilbert.*

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2. THE DECISION OF THE COURT OF APPEALS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH IS ALREADY PENDING BEFORE THIS COURT.

This Court has granted certiorari in *Wetzel v. Liberty Mutual Insurance Company, supra, cert. granted* sub nom. *Liberty Mutual Insurance Company v. Wetzel* No. 74-1245, 421 U.S. 987, and in *Gilbert v. General Electric Company, supra, cert. granted* sub nom. *General Electric Co. v. Gilbert* Nos. 74-1589, 74-1590, ... U.S. ..... In both cases the question presented is whether an employer's exclusion of coverage for pregnancy related disabilities from a disability income protection plan constitutes sex discrimination proscribed by Title VII of the 1964 Civil Rights Act.

The instant case, and *Hutchison v. Lake Oswego School District No. 7, supra,* conclude that denial of sick leave benefits in cases of normal pregnancy to teachers by school district employers constitutes sex discrimination proscribed by Title VII of the 1964 Civil Rights Act (as extended to governmental employers in 1972). The *Hutchison* decision which was followed by the Ninth Circuit Court of Appeals in this case, relied upon *Wetzel* in its conclusion that Title VII established a statutory criterion for the determination of employee rights, different from the criterion this Court applied under the Fourteenth Amendment in *Geduldig v. Aiello, supra.*

The decisions of the Courts of Appeals in *Wetzel, Gilbert, Hutchison,* and this case all depend upon the same controlling legal issue: absent invidious discrimination, may an employer lawfully deny paid disability benefits to employees in cases of normal pregnancy.

In this case a permanent injunction has been granted against a public entity in favor of a class, involving accrued sick pay benefits. Amendment of California Education Code §13456, effective January 1, 1976 (Appendix D), has blunted the future effect of the judgment, but the District stands in jeopardy as to accrued claims of Mrs. Berg and the class which she represents. It would be unjust to the District and unsettling to the law to permit the decision of the Court of Appeals in this case to stand if the decisions in *Wetzel, Gilbert,* and *Hutchison* are reversed.

---

3. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL COURT JURISDICTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT WHICH SHOULD BE SETTLED BY THIS COURT.

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court identified two jurisdictional prerequisites to a District Court action under Title VII:

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the

> right to sue, 42 USC §§2000e-5(a) and 2000e-5(e) [42 USC §§2000e-5(a) and 2000e-5(e)]."
>
> 411 U.S. 792 at 798.

Neither of these jurisdictional prerequisites had been met when this action was filed on February 5, 1973. Mrs. Berg's EEOC charged was filed before the District took any action respecting her maternity leave, and her charge was not under oath (CR 255). There was therefore no timely or lawful EEOC charge upon which federal court jurisdiction could be based. Additionally, Mrs. Berg filed suit without having received the required statutory notice of her right to sue. The Court of Appeals held that a preliminary injunction could issue under Title VII without the receipt of notice of right to sue, and that the filing of a supplemental complaint after receipt of the notice operated to cure any initial jurisdiction defect, stating with reference to the language in *McDonnell Douglas Corp. v. Green:*

> "However, we read this statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits."

The holding of the Court of Appeals in this case imposes upon employers a special body of obligations to their employees created by Congress as statutory law under Title VII of the Civil Rights Act, and deprives employers of the procedural protections which the Congress also mandated. Assuming that the statutory theory of *Wetzel* and *Hutchison* is cor-

rect, it is not just to impose those special obligations absent the "procedural niceties" intended by Congress to be effective when the obligations were created.

In any event, the jurisdictional holding of the Court of Appeals cannot be squared with the rule that federal court jurisdiction depends on the facts as they exist at the time suit is commenced and cannot be conferred by subsequent events. [*Minneapolis & St. L. R. Co. v. Peoria & P.U.R. Co.*, 270 U.S. 580 (1926); *National Labor Rel. Bd. v. Atlanta Metallic Casket Co.*, 205 F.2d 931 (5th Cir. 1953); *Royalty Service Corporation v. City of Los Angeles*, 98 F.2d 551 (9th Cir. 1938)].

CONCLUSION

For the reasons discussed above, petitioners respectfully submit that certiorari should issue to review the decision of the Ninth Circuit Court of Appeals.

Dated, January 12, 1976.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-1457

Sonja Lynn Berg, individually and on behalf of all other female employees of the Richmond Unified School District,
Plaintiff-Appellee,

vs.

Richmond Unified School District, Richmond Board of Education, and W. W. Snodgrass,
Defendants-Appellants.

[December 9, 1975]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: MERRILL and KOELSCH, Circuit Judges, and SMITH,* District Judge

KOELSCH, Circuit Judge:

When plaintiff Berg, a school teacher employed by defendant Richmond Unified School District, became pregnant, the defendants—the School District and its

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

officers—acting pursuant to a district policy relating solely to pregnant employees,[1] threatened to (1) require her to cease working on a date earlier than she

---

[1]Two distinct "maternity leave" policies were involved.

The first, which remained in effect well into plaintiff's sixth month of pregnancy, provided that a pregnant permanent certificated employee such as plaintiff take a mandatory leave of absence commencing at the start of the seventh month of pregnancy, and contained no allowance for compensation during the term of such leave.

The second, a so-called "interim maternity leave policy," was adopted during plaintiff's sixth month of pregnancy, and, as revised during her ninth month of pregnancy, provided as follows:

> "Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:
>
> "A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes and pupils.
>
> "B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.
>
> "C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.
>
> "a) The expected date of delivery, and the date to which the physician recommends continued employment.
>
> "b) A statement as to whether the pregnancy is unusual in any respect.
>
> "c) A statement as to the current health of the employee and the foetus.
>
> "d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:
>
> "Maintaining control and direction of approximately 30 active students.
>
> "Staying with a class for periods of not less than one hour without interruption.

and her physician believed necessary and (2) deny her the benefit of accumulated sick leave pay while she was not working. Thereafter, in the fifth month of her pregnancy, plaintiff filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination based on sex.

About two months later, plaintiff requested the EEOC to issue her a "right to sue" letter.[2] She waited in vain for about a month and then commenced this class action in the district court under the purported authority of the Civil Rights Act of 1871, 42 U.S.C. §1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the fourteenth amendment to the federal constitution. At the same time, she secured a preliminary injunction staying the defendants from their threatened action. Shielded by this order, she continued to teach until the day before her child was born. Meantime, the EEOC did issue its letter, and plaintiff duly supplemented her complaint. Ultimately, the district court granted plaintiff summary judgment on the Title VII claim, certi-

---

"Undergoing jostling and bumping incident to the movement of students on school premises.

"Supervising games and sports of students.

"Coping with student fights, accidents and illnesses.

"Driving to and from work.

"D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement."

[2]The Commission's notification to a charging party under 42 U.S.C. 2000e-5(f)(1) that no conciliation agreement has been entered with the party charged is often referred to as a "right to sue letter (or notice)." *See, e.g., Black Musicians of Pittsburgh v. Local 60-471, American Federation of Musicians,* 375 F. Supp. 902 (W.D. Pa. 1974).

fied a class, issued a permanent injunction against the defendants, and allowed plaintiff attorney's fees.[3] The appeal followed. We affirm.

Defendants' initial contention, that the district court lacked subject matter jurisdiction because no "right to sue" letter had issued at the time of the commencement of the action, is without merit. Putting aside for a moment discussion of the district court's jurisdiction over the Title VII claim upon which permanent injunctive relief was ultimately predicated, we are clear that the district court possessed independent

[3]The judgment of the district court was, in pertinent part, as follows:

"It Is Therefore Ordered, Adjudged and Decreed that:

"(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

"(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by a district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

"(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnacy and delivery;

"(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

"(5) plaintiff's attorney shall be paid reasonable attorney's fees by defendants in the amount of $3,675.00; [and]

"(6) costs shall be awarded to plaintiff against defendants in accordance with plaintiff's memorandum of costs filed in accordance with Rule 124(e) of the Local Rules of this Court."

subject matter jurisdiction to reach the question of preliminary injunctive relief under 28 U.S.C. §1343 (3), based on plaintiff's §1983 claim that she was deprived of her rights to due process and equal protection of the laws.[4]

Section 1343(3) grants the district courts original jurisdiction of civil actions

> "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ."

Because plaintiff's §1983 claim falls within the scope of this language, "§1343(3) . . . conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction." *Hagans v. Lavine,* 415 U.S. 528, 537 (1974). *See Bell v. Hood,* 327 U.S. 678, 682-683 (1946); *Holder v. Nelson,* 514 F.2d 1091, 1092 (9th Cir. 1975).

Applying the test of *Goosby v. Osser,* 409 U.S. 512, 518 (1973), as further elucidated in *Hagans, supra,* 415 U.S. at 536-543, we conclude that plaintiff's §1983 due process and equal protection claims were not "so utterly devoid of merit as to deprive the district court

[4]While the existence of the district court's §1343(3) jurisdiction over the school district and board may be questionable in light of the Supreme Court's subsequent decision in *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), such jurisdiction was clearly present over defendant Snodgrass, the district superintendent.

of its jurisdiction under §1343." *Holder v. Nelson, supra,* 514 F.2d at 1092.[5]

Moreover, it appears to us that the district court had subject matter jurisdiction under Title VII itself to reach the merits of the preliminary injunction issue. In a limited class of cases such as this one, in which there exist both a high probability of the claimants ultimate success on the merits and the threat of irreparable injury of the sort which the Act seeks to avoid, a Title VII claimant may personally bring suit to maintain the status quo pending disposition by the EEOC of the underlying charge of discrimination. *See Drew v. Liberty Mutual Insurance Co.,* 480 F.2d 69, 72-76 (5th Cir. 1973); *Culpepper v. Reynolds Metals Company,* 421 F.2d 888, 893-895 (5th Cir. 1970); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1256-1259 (1971).[6]

And finally, the later issuance of the "right to sue" letter coupled with the filing of the supplemental

[5]The substantiality of the §1983 equal protection claim may have been rendered doubtful by the Supreme Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), and our decision in *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961 (9th Cir. 1975). But both of those decisions were rendered well after the entry of final judgment in the instant case.

Similarly, *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974), and *Turner v. Dept. of Employment Security,* ..... U.S. ....., No. 74-1312 (Nov. 17, 1975), both of which have bearing on plaintiff's due process claim but neither of which clearly dispose of it, were decided well after final judgment here.

[6]As noted in *Culpepper, supra,* 421 F.2d at 894-895, the existence of irreparable injury may in appropriate circumstances be presumed, for purposes of preliminary injunctive relief, from the district court's preliminary determination that Title VII has been violated.

complaint operated to cure any initial jurisdictional defect. *Henderson v. Eastern Freight Ways, Inc.,* 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied,* 410 U.S. 912 (1973); *Jones v. United Gas Improvement Corporation,* 383 F. Supp. 420, 424 (E.D. Pa. 1974); *Dodge v. Giant Food, Inc.,* 3 E.P.D. ¶8184 (D.D.C. 1971), *aff'd,* 488 F.2d 1333 (D.C. Cir. 1973).

True, such letters have often been characterized a "jurisdictional prerequisite" to a lawsuit under Title VII. *See, e.g., McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973). However, we read this statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits. *See Jones, supra; Shaffield v. Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp. 937, 940 (M.D. Ala. S.D. 1974); and cases cited therein. *Cf. Davis v. Valley Distributing Company,* ..... F.2d ....., ..., No. 73-2725 (9th Cir. July 30, 1975), slip-op. at 6-7. As noted in *Beverly v. Lone Star Lead Construction Corporation,* 437 F.2d 1136, 1140 (5th Cir. 1971), "[t]he sole purpose of this requirement is to provide a formal notification to the claimant that his administrative remedies with the Commission have been exhausted." *Cf. Stone v. E.D.S. Federal Corporation,* 351 F. Supp. 340, 343 (N.D. Cal. 1972). Under the circumstances here presented—where the district court initially had independent subject matter jurisdiction, and where plaintiff had requested the letter—requiring her to commence a new action would be a pointless exercise in formalism.

Turning now to the merits of the Title VII claim, we note that 42 U.S.C. §2000e-2 broadly outlaws discrimination in employment based on sex.[7] Whether this section prohibits the district policy here under attack is of course a question of statutory interpretation, not one of constitutional analysis. *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, 964 (9th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Company,* 511 F.2d 199, 203 (3d Cir. 1975), *cert. granted,* 421 U.S. 987 (1975).[8]

The defendants take the position that the interim maternity leave policy does not violate §2000e-2 because the policy establishes no sex-based classification —*i.e.,* it is applicable only to pregnant women, not all women. This contention does have a surface appeal when considered against the background of the Supreme Court's dictum in "footnote 20" of *Geduldig v. Aiello,* 417 U.S. 484, 496 n.20 (1974),[9] but it is fore-

[7]Section 2000e-2 provides in part:

"(a) It shall be an unlawful employment practice for an employer—

"(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

"(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

[8]As *Hutchison* makes clear, the prohibitions of Title VII may extend beyond the reach of the Equal Protection Clause. *See also Satty v. Nashville Gas Company,* ..... F.2d ....., ..., No. 75-1083 (6th Cir. Aug. 8, 1975), slip-op. at 8; *Gilbert v. General Electric Company,* ..... F.2d ....., ..., No. 74-1557 (4th Cir. June 27, 1975), slip-op. at 10-15. *But see United States v. Chesterfield County School District,* 484 F.2d 70, 73 (4th Cir. 1973).

[9]In "Footnote 20" of *Geduldig* the Court stated in part:

"While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

closed by our recent decision in *Hutchison, supra.* We therefore reject it.

In *Hutchison,* we held that a school districts exclusion of pregnancy- or childbirth-related disabilities from sick leave coverage was a Title VII violation. In reaching that conclusion, we accorded "great deference," consistent with the teachings of *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971), to the EEOC's interpretation of Title VII as expressed in the relevant guideline promulgated by the agency.[10]

[10]The guideline, 29 C.F.R. §1604.10(b), provides:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

Other circuits have similarly regarded and followed that guideline. *See Satty v. Nashville Gas Company,* ..... F.2d ....., ..., No. 75-1083 (6th Cir. Aug. 8, 1975), slip-op. at 8; *Gilbert v. General Electric Company,* ..... F.2d ....., ..., No. 74-1557 (4th Cir. June 27, 1975), slip-op. at 6-7, *cert. granted,* ..... U.S. ....., Nos. 74-1589/1590 (Oct. 6, 1975); *Holthaus v. Compton & Sons, Inc.,* 514 F.2d 651, 653 (8th Cir. 1975); *Communication Workers v. American Telephone and Telegraph Company,* 513 F.2d 1024, 1030-1031 (2d Cir. 1975); *Wetzel, supra,* 511 F.2d at 206-207; *Farkas v. South Western City School District,* 506 F.2d 1400 (6th Cir. 1974), *aff'g* 8 FEP Cases 288 (S.D. Ohio 1974). *See also Sale v. Waverly-Shell Rock Board of Education,* 390 F. Supp. 784, 787-788 (N.D. Iowa 1975); *Vineyard v. Hollister School District,* 64 F.R.D. 580, 585 (N.D. Cal. 1974).

Hutchison manifests the conclusion that the district policy violates Title VII not only in respect to its denial of sick leave pay during pregnancy-occasioned absences but also in respect to its compulsion of pregnancy leave in the district's discretion. The agency guideline relied on in *Hutchison* interprets the statute as requiring "employment policies and practices involving matters such as the commencement and duration of leave [and] the availability of extensions . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." We are unable to say that "application of the guideline would be inconsistent with an obvious congressional intent

not to reach the employment practice in question," *see Hutchison, supra,* 519 F.2d at 965 [*quoting Espinoza v. Farah Manufacturing Co., Inc.,* 414 U.S. 86, 94 (1973)].

Plaintiff has moved for the allowance of an attorney's fee for the services rendered by her counsel on this appeal. Having duly considered the matter, we conclude that $1,500.00 is a reasonable sum for such services. That sum is allowed as part of the costs. 42 U.S.C. §2000e-5(k).

The judgment is affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-3181
No. 74-3182

Barbara R. Hutchison,
Plaintiff-Appellee, Cross-Appellant,

vs.

Lake Oswego School District No. 7, Dr. Thomas Cottle, Edward Allen, Samuel H. Melrose, Jr., Garry R. Bullard, and James S. Putnam, in their capacities as members of the Lake Oswego School District Board,
Defendants-Appellants, Cross-Appellees.

[July 21, 1975]

Appeal from the United States District Court
for the District of Oregon

OPINION

Before: KOELSCH and CARTER, Circuit Judges, and SCHNACKE,* District Judge.

JAMES M. CARTER, Circuit Judge:

Defendants Lake Oswego School District Board ("the school board") and its individual members appeal from the judgment of the district court, enjoining the school board from refusing to grant sick leave benefits for absence due to childbirth, and awarding plaintiff Hutchison lost wages, costs, and attorney's fees against the school board and its individual memebrs. Hutchison, on the other hand, appeals from the district court's dismissal of the Lake Oswego School District No. 7 ("the school district") on Eleventh Amendment grounds. We affirm in part and reverse in part.

Hutchison was employed for two school years by the school district as a part-time junior high school teacher. On January 27, 1973, she gave birth to a child, necessitating her absence from work for 15 working days. She suffered no complications as a result of either her pregnancy or childbirth. Upon her return to work, she requested that she be allowed sick leave benefits for her absence—she had accured 15 days sick leave at that time.

The school board refused her request on the basis of § 415.1 of the school district's Policies and Procedures and Ore. Rev. Stat. § 342.595, both providing

*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

for a minimum amount of sick leave for "illness or injury." Pregnancy was not deemed to be an "illness or injury" but rather a temporary disability permitting leave without pay. This interpretation was rendered by the superintendent of the Lake Oswego Schools and concurred in by the Director of Legal and Executive Services for the Oregon State Department of Education. The sum of $339.59 was deducted from Hutchison's wages because of her absence from her job and the necessity of hiring a replacement during her absence.

After exhausting all possible administrative remedies, she brought the present suit seeking a declaration that the school district's maternity leave policy constituted sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). She also sought damages under 42 U.S.C. § 2000e-5(g), and attorney's fees under 42 U.S.C. § 2000e-5(k).

The case was submitted without trial on the briefs and certain stipulated facts. The district court dismissed the school district on the basis of sovereign immunity, but found that the school board and its individual members had engaged in unlawful sex discrimination in violation of both the Equal Protection Clause and Title VII.

The defendants contend on appeal that: the refusal to grant sick leave benefits for normal pregnancy violates neither the Equal Protection Clause nor Title VII; the recovery of back pay and attorney's fees

from the individual school board members is barred by the doctrine of qualified immunity for acts done in good faith and within the scope of their official duties; and such recovery against the school board is barred by the Eleventh Amendment. Hutchison contends that the doctrine of sovereign immunity was improperly applied to the school district.

EQUAL PROTECTION

The decision of the district court was rendered prior to the Supreme Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), which held that the State of California was not required by the Equal Protection Clause to provide for absences due to normal pregnancy and childbirth under its state disability benefits plan. The Court stated that the State has a legitimate interest in "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately." *Id.* at 496. And with respect to the contention that discrimination on the basis of pregnancy constitutes "invidious discrimination" for purposes of equal protection, the Court stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing

> that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* at 496-497 n.20.

The operation of Oregon's sick leave benefits plan differs somewhat from California's disability benefits plan, and, unlike the *Geduldig* defendant, the defendants in the present case did not make a strong showing below that the exclusion of normal pregnancy from the sick leave policy was necessitated by the increased administrative burden and cost of including such pregnancy. However, we hold that *Geduldig* dictates a similar result in the present case.

Hutchison has not suggested that the policy is a mere pretext designed to effect an invidious discrimination. And inclusion of normal pregnancy in the school district's sick leave plan would unquestionably "be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits . . . , or some combination of these measures." *Geduldig, supra,* at 495-496. We hold that Hutchison cannot validly base her claim on the Equal Protection Clause.

TITLE VII

The defendants concede that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* is applicable to the employment practices of the school board, and that the policy in issue is an "employment practice" within the meaning of Title VII. However, they rely upon Footnote 20 of *Geduldig, supra,* to support their contention that discrimination on the basis of pregnancy is not sex discrimination. But the defendants have greatly overstated the reach of *Geduldig* in general and Footnote 20 in particular.

First, the school district cites Footnote 20 as if it states that discrimination on the basis of pregnancy is *never* sex-based. That is not what the Footnote provides. Rather, it states that not *every* legislative classification concerning pregnancy is sex-based.

Second, in *Geduldig* the Court was considering whether such classification violated the Equal Protection Clause. Title VII was not at issue. The school district contends that since the threshold question under Title VII is whether or not there has been discrimination on the basis of sex, and since the Supreme Court in *Geduldig* has stated that exclusion of pregnancy benefits under a state disability plan is not sex-based, the Court decided the Title VII issue sub silentio.

Title VII, however, unlike the Equal Protection Clause, proscribes classifications which *"in any way* would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely*

affect [her] status . . ." (Emphasis added.)[1] This language certainly is conducive to an interpretation different from that premised upon the language of and cases interpreting the Equal Protection Clause. "In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance upon [*Geduldig*] is misplaced." *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 203 (3 Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (5/27/75).

To effectuate the goals of Title VII, Congress entrusted the promulgation of regulations or guidelines thereunder to the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-4. The guidelines so promulgated are the agency's interpretation of the statute and indicate what are or are not proscribed discriminatory practices. *Wetzel, supra*, 511 F.2d at 204. These EEOC guidelines are entitled to "great deference" with respect to the proper interpretation of Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The EEOC guideline applicable to the school board's sick leave policy in the present case unequivocally

[1]Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

"It shall be an unlawful employment practice for an employer—

(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or

(2) . . . classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ."

provides that the exclusion of pregnancy or childbirth related disabilities from sick leave coverage is a violation of Title VII.[2] Unless "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question", the school board's sick leave policy must be deemed to be violative of Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

In enacting Title VII, Congress intended to eliminate all discriminatory employment practices, H. Rep. No. 914, 1964 U.S. Code Cong. & Admin. News 2401, including discriminatory treatment of men and women. *See Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7 Cir.), *cert. denied*, 404 U.S. 991 (1971).[3] Clearly, a sick leave policy which excludes from coverage absences related to pregnancy or childbirth adversely and disparately affects women with

[2]29 C.F.R. § 1604.10(b) provides:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

[3]"The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis, supra*, 444 F.2d at 1198.

respect to employment benefits. This interpretation is in no way inconsistent with the language of Title VII or congressional intent to eliminate all employment practices which discriminate on the basis of sex. In fact, "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications." *Frontiero v. Richardson,* 411 U.S. 677, 687 (1973). *See also* 1972 U.S. Code Cong. & Admin. News 2137 (House Report concerning sex discrimination and the 1972 amendments to Title VII).

In *Sprogis, supra,* it was stated with respect to Title VII: "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy." 444 F.2d at 1198. We decline to ratify such discrimination under the facts of this case and in light of a reasonable EEOC guideline specifically proscribing the exclusion of pregnancy from sick leave coverage.

In the proceedings below, the defendants placed all of their "eggs" in the Footnote 20 "basket". On appeal they contend that the exclusion of childbirth from their sick leave policy is justified because pregnancy is voluntary and is not an "illness or injury", and because of the administrative burden and cost engendered by adding pregnancy and childbirth related disabilities to the sick leave coverage. In support of this latter defense, they cite statistics in the Brief of Amicus Curiae American Telephone and Telegraph Company.

We do not consider factual and legal defenses raised for the first time on appeal. We do note, however, that administrative costs which might justify an employment practice for purposes of equal protection would not necessarily constitute an adequate defense under Title VII. Further, we must assume that the EEOC was aware of the increased costs that would be required in order to comply with its guidelines. And finally, those circuit courts and the majority of district courts which have considered the defenses raised by the school district have held them to be without merit. *See, e.g., Wetzel, supra,* at 206: "Under Liberty Mutual's policy, all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand." *See also Gilbert v. General Electric Co.,* ..... F.2d ....., 44 U.S.L.W. 2013 (4 Cir. June 27, 1975); *Farkas v. South Western City School Dist.,* 506 F.2d 1400 (6 Cir. 1974), *aff'g* 8 FEP Cases 288 (S.D. Ohio 1974); *Vineyard v. Hollister School Dist.,* 64 F.R.D. 580, 585 (N.D. Cal. 1974); *Sale v. Waverly-Shell Rock Bd. of Educ.,* 390 F.Supp. 784, 788 (N.D. Iowa 1975).

ELEVENTH AMENDMENT—SOVEREIGN IMMUNITY

In *Edelman v. Jordan,* 415 U.S. 651 (1974), the Supreme Court held that retroactive welfare payments awarded against the Illinois Department of Public Aid were barred by the Eleventh Amendment,

proscribing monetary awards against a State. In the present case, the district court awarded Hutchison sick leave benefits, costs, and attorney's fees under 42 U.S.C. § 2000e-5(k) against the school board and its individual members, but dismissed the school district. The defendants contend that *Edelman, supra,* bars an award of back pay or attorney's fees against either the school district or school board. We disagree.

The most important factor in determining whether a particular agency is the "alter ego" of the State for Eleventh Amendment purposes is "whether payment of a judgment will have to be made out of the state treasury, i.e., whether the fund in question has both the independent power and resources to pay the judgment without further action by the state legislature or other governmental officer." *Bowen v. Hackett,* 387 F.Supp. 1212, 1221 (D.R.I. 1975). Also important to our decision are the following factors: performance by the entity of an essential government function, ability to sue or be sued, power to take property in its own name or in the name of the State, and corporate status of the entity. *George B. Whitten, Jr., Inc. v. State University Construction Fund,* 493 F.2d 177 (1 Cir. 1974).

The autonomous nature of school districts (and their administrative arms, the district school boards) in Oregon with respect to the factors noted above is evident from a reading of the relevant Oregon statutory provisions. Of primary importance is the fact that most of a school district's financing comes from local and not state-wide sources. Although the State

does aid the various school districts, the amount is based upon the number of resident students and may not be used as an offset to the school district's own tax levy. Ore. Rev. Stat. § 327.090.[4] Therefore, the Lake Oswego School District has the *power* to obtain funds to satisfy a monetary judgment, and is precluded from applying *State* funds to offset such a levy. A set amount of State aid is awarded each year on the basis of the number of students, an amount which would not be altered by the back pay award in the present case.

With respect to the other relevant factors, school districts are "bodies corporate", § 332.072,[5] and the district school boards may sue and be sued, § 332.072, may condemn property for school purposes, § 332.182,[6]

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[4]"327.090 Apportionments as revenue; limitation on use. The amount to be received from the Basic School Support Fund shall be included as revenue in the budget of each school district. No part of such fund shall be apportioned and distributed to apply as an offset to a school district tax levy."

[5]"332.072 Legal status of school districts. All school districts are bodies corporate, and the district school board is authorized to transact all business coming within the jurisdiction of the district and to sue and be sued. Pursuant to law, district school boards have control of the district schools and are responsible for educating children residing in the district."

[6]"332.182 Condemnation of realty for school purposes. (1) Whenever it is necessary for any school district to acquire any real property for necessary school purposes, and the owner of the real property and the district school board cannot agree upon the price to be paid therefor, and the damage for the taking thereof, if any, the district school board may commence and prosecute any necessary or appropriate action for the condemnation of the real property required for school purposes. The title acquired by any school district by any such action shall be a fee simple title.

(2) The procedure for condemnation shall be the procedure provided by law for condemnation of land or rights of way by public corporations or quasi-public corporations for public use or for corporate purposes."

and may contract indebtedness, § 328.565.[7] We hold that the analysis of the court in the recent case of *Gordenstein v. The University of Delaware,* 381 F. Supp. 718, 722-723 (D. Del. 1974), is equally applicable to the school district and school board in the present case:

> "Since the state treasury is insulated from a judgment in the plaintiff's favor, since the University has both the funds and the legal power to satisfy such a judgment, and since under Delaware law the University is an independent corporation exercising virtually complete fiscal and educational autonomy, this Court concludes that the University is not an arm or alter ego of the State of Delaware under the Eleventh Amendment and therefore is not immune from suit. The

[7]"328.565 Power to create indebtedness for current expenses and bond retirement; limitation. (1) Any district school board may contract indebtedness by the issuance of warrants or short-term promissory notes for the purpose of meeting current expenses, retiring outstanding bonds or warrants or paying the interest thereon, whenever provision therefor has been made in its duly adopted budget. In the exercise of the authority given in this subsection, the district school board may contract or refund short-term loans which shall at no time exceed in the aggregate 80 percent of the ad valorem taxes upon real and personal property theretofore levied and remaining uncollected for such school district for the tax year in which the warrants or notes are issued and 80 percent of other budgeted and unpledged revenues which the district school board estimates will be received from other sources during such tax year.

(2) A district school board may, at its option, borrow moneys pursuant to this section or ORS 287.402 to 287.432."

Such indebtedness may be paid by means of a *district-wide* tax levy:

"328.555 Property liable for district indebtedness; tax levy. (1) All taxable property in a school district at the time any indebtedness is incurred by such district and all taxable property subsequently located in the area comprising such district shall be liable to taxation for the payment of such indebtedness until paid."

> fact that the University may be assisting the State of Delaware in the performance of a governmental function is not determinative." (Citations omitted.)

Our holding that neither the school district nor the school board as a body is immune from suit obviates the necessity of deciding two additional contentions raised by Hutchison: (a) that even if this is deemed to be a suit against the State, attorney's fees may be awarded in conjunction with the granting of prospective injunctive relief;[8] and (b) that the state in ratifying the Thirteenth and Fourteenth Amendments *consented* to Congress' authority under the enabling clauses of those Amendments to make state and local governments amenable to suit in federal court by individual employees.[9]

[8]This contention finds support in the recent cases of *Souza v. Travisono,* ..... F.2d ....., 43 U.S.L.W. 2402 (1 Cir. 3/11/75), and *Downs v. Department of Public Welfare,* ..... F.Supp. ....., 43 U.S.L.W. 22 70(E.D. Pa. 12/20/74). In *Downs* the court held that "an award of counsel fees is both clearly remedial and an integral part of a decree providing prospective relief from violations of federal statutory and/or constitutional rights." Since such fees are incidental to prospective injunctive relief, are necessary to the future compliance with federal law (private attorney general theory), and have a minimal impact on the State treasury, "the Eleventh Amendment does not bar an order directing individual defendants to satisfy an award of attorneys fees from state funds." *Id.* at 2271. *See also Jordan v. Fusari,* 496 F.2d 646, 651 (2 Cir. 1974); *Class v. Norton,* 505 F.2d 123, 126 (2 Cir. 1974).

[9]*But see generally Skehan v. Board of Trustees, Bloomsburg State College,* 501 F.2d 31, 42-43 n.7 (3 Cir. 1974); *Jordan v. Gilligan,* 500 F.2d 701, 708-710 (6 Cir. 1974).

QUALIFIED IMMUNITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

Finally, the individual members of the school board contend that they are protected by a qualified "good-faith" immunity from liability for damages. We agree. In *Scheuer v. Rhodes,* 416 U.S. 232, 247-248 (1974), the Supreme Court stated: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Recently, this qualified immunity was extended to school board members acting in good faith, *Wood v. Strickland,* ..... U.S. ....., 43 U.S.L.W. 4293 (February 25, 1975). The Court stated: "The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice." *Id.* at 4298.

Although the Court was dealing with student discipline in *Wood,* the principles enunciated are equally applicable in the present circumstances. The school board members did not disregard "settled, indisputable law" since the courts themselves have been split as to whether or not pregnancy may permissibly be excluded from sick leave coverage. The school board specifically asked the State Director of Legal and Executive Services for a ruling on the issue and acted in reliance thereon. Although we conclude that

the school board's exclusion of pregnancy and childbirth related disabilities from sick leave coverage violated Title VII, the board members clearly acted in good faith and within their official capacities and are therefore entitled to qualified immunity from the payment of damages.

We affirm that portion of the district court's judgment and opinion finding that the Lake Oswego School District Board's sick leave policy violates Title VII, enjoining exclusion of pregnancy and childbirth related disabilities from the plan and awarding back pay, costs, and attorney's fees against said Oswego School District Board. We reverse the judgment and opinion so far as it dismisses the Lake Oswego School District No. 7 and holds liable the individual school board members for back pay, costs, and attorney's fees, and we direct that judgment be entered for Hutchison and against Lake Oswego School District No. 7, jointly and severally with Lake Oswego School District Board, for back pay, costs and attorney's fees; finally, we reverse that portion of the judgment and opinion finding the sick leave policy to be in violation of the Equal Protection clause of the Fourteenth Amendment.

The cause is remanded for entry of judgment accordingly.

SCHNACKE, District Judge (concurring and dissenting).

I agree that defendants' conduct does not violate the Equal Protection Clause. But I do not believe it violates Title VII either.

The Supreme Court, in *Geduldig v. Aiello,* 417 U.S. 484, 496-497, incl. fn. 20, stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

The Court was clearly saying that any discrimination in California's program was not because of sex and that any adverse effect the program's classifications had on plaintiffs there was not in any way due to their sex. A program with such characteristics would not involve illegal sex bias under Title VII [see 42 U.S.C. §2000e-2(a)], and the school district's sick leave plan is such a program. Plaintiff here has not suggested that the district's "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one

sex or the other" [see *Geduldig v. Aiello, supra* at fn. 20]. On the contrary the district simply made a reasonable, good faith decision to cover only "illness or injury" in their program and, on good authority, determined that pregnancy is not an illness or injury. (The California program also covered only illnesses and injuries.)

Thus, there are compelling indications that the EEOC guidelines are wrong in treating the district's pregnancy exclusion as a Title VII violation, so that courts need not defer to them on this point [*Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 94-95 (1973)].

Since I do not think plaintiff here has any claim on which a federal court may grant her relief, I express no opinion as to whether the Eleventh Amendment bars non-injunctive relief against defendants school district and school board or whether defendant school board members are individually liable for damages.

Appendix C

United States District Court
for the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc., Plaintiff,
vs.
Richmond Unified School District, et al., Defendants.

[Filed Feb. 22, 1973]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, a teacher employed by defendant school district, is pregnant; she anticipates delivery of her child on or after March 24, 1973. Her attending physician has determined that she may safely work until the date of her confinement, and plaintiff wishes to do so. The school district, however, has an "interim policy" on pregnancy leaves, which requires that plaintiff submit to an examination by a school district-appointed physician and which reserves to the school district the final determination of the date for commencement of her leave. In this suit, brought as a class action, plaintiff attacks this "interim policy" and also attacks defendants' policy of refusing

to allow the use of accumulated sick pay during maternity leave. At this time plaintiff seeks a preliminary injunction prohibiting defendants from forcing her to take a leave of absence before the time she and her physician determine that this is necessary. If the court does not act, because of plaintiff's refusal to submit to examination by defendants' physician, she will be forced to begin a leave of absence on February 23, 1973.

The factors to be taken into consideration in weighing an application for a preliminary injunction are the relative importance of the rights asserted, the acts to be enjoined, the hardship that would result during the pendency of the action from granting or refusing to grant a preliminary injunction, the probability of ultimate success, and the public interest. *King v. Saddleback Junior College District*, 425 F.2d 426, 427 (9th Cir. 1970). Because, as discussed below, the act to be enjoined has generally been regarded as a violation of the equal protection clause and is a patent violation of the Equal Employment Opportunities Act, 42 U.S.C. § 2000e-2(a), the court concludes that all these factors would be promoted by granting a preliminary injunction: Plaintiff will be able to exercise the important rights granted in the Equal Employment Opportunities Act only if a preliminary injunction is granted, whereas granting it will only deny defendant an opportunity to act in contravention of the Act and the fundamental public policy behind it.

The question whether forced maternity leave unconstitutionally discriminates against women has gen-

erally been answered in the affirmative by the reported federal court decisions considering the issue, including a decision by Judge Harris of this court. *Green v. Waterford Board of Education,* 41 U.S.L.W. 2419 (2d Cir. Jan. 29, 1973); *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972); *Bravo v. Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Pocklington v. Duval County School District,* 345 F. Supp. 163 (M.D. Fla. 1972); *Robinson v. Rand,* 340 F. Supp. 37 (D. Colo. 1972); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *Doe v. Osteopathic Hosp. of Wichita,* 333 F. Supp. 1357 (D. Kan. 1971). One federal court, however, has held that such a regulation does not violate the equal protection clause. *Cohen v. Chesterfield County School Board,* 41 U.S.L.W. 2390 (4th Cir. Jan. 15, 1973) (en banc); a second federal court indicated in *dictum* that it did not believe such a regulation would violate the equal protection clause. *Schattman v. Texas Employment Comm'n,* 459 F. 2d 32 (5th Cir. 1972) (dictum).

Even though the present action is not brought pursuant to the Equal Employment Opportunities Act, the cases holding forced pregnancy leave to be sex discrimination are now supported by the Equal Employment Opportunities Act. Since the time of the events involved in the prior reported cases, Congress extended the Act to include public employers such as defendants. Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (1972). Thus, defendants, like any employer, are

bound by 42 U.S.C. § 2000e-2, which forbids employers from discriminating on the basis of sex. The agency with enforcement responsibility for this statute, the EEOC, has interpreted this provision as requiring that:

> policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

This guideline is entitled to great deference. *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In view of defendants' failure to even suggest why it might not be valid, the court must accept this interpretation of the requirements of the Act. Although the EEOC's guidelines are not directly applicable to a suit brought pursuant to 42 U.S.C. § 1983, "they are helpful and persuasive in considering the . . . constitutional issue raised in cases . . . brought . . . against public agencies." *Western Addition Community Organization v. Alioto,* 340 F. Supp. 1351, 1353 n.1 (N.D. Cal. 1972); *see Castro v. Beecher,* 459 F.2d 725, 733 (1st Cir. 1972).

In view of this authority requiring that pregnancy not be treated differently than any other temporary disability, it is clear that the challenged forced-leave policy is invalid. First, pregnancy is the sole dis-

ability for which the district forces an employee to take a leave of absence even when the employee and attending physician do not deem it necessary. Second, only a person who is pregnant is forced to submit to an examination by the school district's doctor in order to continue working. The court therefore concludes that plaintiff is entitled to a preliminary injunction.

In her motion, plaintiff asked that the preliminary injunction encompass the entire class. The court has not yet determined that this is a proper action to be maintained as a class action, nor does it have sufficient information to even provisionally make that determination. Moreover, it does not appear that the class is so numerous that other persons affected by the policy could not simply intervene. Therefore, the preliminary injunction will encompass only the named plaintiff.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Ordered that defendants are hereby enjoined, pending the conclusion of this lawsuit, from terminating plaintiff's employment, requiring her to take a leave of absence, or otherwise enforcing against plaintiff any policy requiring her to take pregnancy leave of absence other than when deemed necessary by plaintiff and her physician.

Dated: February 22, 1973

Alfonso J. Zirpoli
United States District Judge

United States District Court
For the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc.,
Plaintiff,
vs.
Richmond Unified School District, et al.,
Defendants.

[Filed Jul. 30, 1973]

ORDER DENYING MOTION TO DISMISS

In this action plaintiff alleges that she was discriminated against in her employment on account of sex contrary to 42 U.S.C. § 1983 and the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. Since the suit was filed on February 5, 1973, there have been a series of motions and orders concerning the court's jurisdiction. In essence, the court previously ruled that it had jurisdiction pursuant to § 1983 to grant injunctive relief against the public-entity defendants and to grant both injunctive and monetary relief against defendant Snodgrass. This court also ruled that the 1964 Civil Rights Act was not a proper jurisdictional basis, because the plaintiff had not received a right-to-sue letter prior to commencing this suit as 42 U.S.C. § 2000e-5 appears to require. There-

after, plaintiff moved to file a supplement to her complaint to allege the receipt of a right-to-sue letter, and, over defendants' objection, the motion was granted. Defendants now move to dismiss the supplement to the complaint on the grounds that the complaint still states no claim under the Civil Rights Act of 1964. While this matter was pending, the Supreme Court decided *City of Kenosha v. Bruno,* 41 U.S. L.W. 4819 (S. Ct. June 11, 1973), and the Fifth Circuit decided *Drew v. Liberty Mut. Life Ins. Co.,* No. 72-3003 (5th Cir. June 4, 1973). In order to consider these decisions, the court goes beyond the present motion and totally reconsiders the jurisdictional bases of this suit.

1. *Jurisdiction pursuant to § 1983:*

The Supreme Court's decision in *City of Kenosha v. Bruno, supra,* rejects the theory that governmental entities can be sued pursuant to § 1983 for injunctive relief even though *Monroe v. Pape,* 365 U.S. 167 (1961), precludes suing them for damages. Thus, the court's prior ruling was erroneous. It is now clear that the complaint states a cause of action pursuant to § 1983 only as to defendant Snodgrass.

2. *Jurisdiction Pursuant to § 2000e-5 Prior to Supplement to Complaint:*

In *Drew v. Liberty Mut. Life Ins. Co., supra,* the Fifth Circuit carefully reviews the relevant statutes and their legislative history, and it concludes that a suit may be brought prior to the issuance of a right-to-sue letter when, as in the present case, temporary

injunctive relief is necessary pending the outcome of Equal Employment Opportunity Commission proceedings. The court is convinced that this is a proper interpretation of the applicable law. Therefore, the court has always had jurisdiction pursuant to § 2000e-5 to grant temporary injunctive relief. Until plaintiff filed a proper supplement to the complaint, however, it lacked jurisdiction over the claim for permanent injunctive relief and for damages.

3. *Jurisdiction Pursuant to § 2000e-5 Subsequent to Supplement to Complaint:*

Defendants' present motion questions whether the supplement to the complaint cures the lack of jurisdiction under § 2000e-5 to grant permanent relief. For the most part, the motion attacks plaintiff's failure to allege with particularity that each precise step in exhausting the administrative remedy was taken. Plaintiff, however, has given notice of her claim that she fulfilled the exhaustion requirement in a "short and plain statement," and this is all that is required. Fed. R. Civ. P. 8(a)(1). If some necessary step has been omitted, defendants should bring that fact before the court in some appropriate form and the court then can resolve the substantive matter rather than evaluating plaintiff's pleading ability.

Defendants also argue that plaintiff's supplement to the complaint is insufficient, because plaintiff failed to obtain a notice of right-to-sue prior to filing the initial complaint. This objection is based upon the argument that the court must have jurisdiction at the outset of a suit. As discussed, however, the

original complaint states a proper claim for injunctive and monetary relief against defendant Snodgrass and for temporary injunctive relief against the other defendants. After the claims were filed, a further cause of action accrued to plaintiff when the right-to-sue letter was issued. Plaintiff properly filed this new related claim as a supplemental claim in this lawsuit rather than filing a second lawsuit and moving for consolidation. To require a second filing by the aggrieved party after termination of the administrative proceeding would serve no purpose other than the creation of an additional procedural technicality. *Cf. Love v. Pullman,* 404 U.S. 522, 526 (1972).

It Is Therefore Ordered that the motion to dismiss is denied.

Dated: July 30, 1973

Alfonso J. Zirpoli,
United States District Judge

United States District Court
for the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc.,
Plaintiff,
vs.
Richmond Unified School District, et al.,
Defendants.

[Filed August 31, 1973]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING IN PART AND GRANTING IN PART MOTION TO CERTIFY CLASS

Plaintiff, a school teacher, commenced this action when defendants threatened to require her to take a pregnancy leave of absence before she or her physician thought that it was necessary. On February 22, 1973, the court enjoined defendants from taking this action, and plaintiff continued to work until the day of her delivery. Plaintiff now seeks summary judgment and an order certifying this as a class action. Defendants have filed a cross-motion for summary judgment.

1. *Summary Judgment as to the Individual Claim:*

The essential basic facts are simple and are not disputed: Plaintiff became pregnant while employed

by the defendant school district. When it became clear that defendants would require her to cease working before she and her physician deemed it necessary and that she would not be permitted to use her accumulated sick leave while she was unable to work, plaintiff filed a charge with the E.E.O.C. In order to prevent defendants from requiring her to leave work while that charge was pending, plaintiff later commenced this suit and obtained a preliminary injunction. Thereafter, she was issued a right-to-sue letter by the E.E.O.C., and, as the court previously ruled, she properly supplemented her complaint to add the cause of action that this created.

The basic legal framework concerning plaintiff's Title VII claim is, similarly, simple. In 42 U.S.C. § 2000e-2(a), Title VII forbids discrimination by an employer against an employee on the basis of sex. Although initially Title VII was not applicable to governmental employers, in 1972 Congress amended the definition of "employer" in 42 U.S.C. § 2000e(b) and expanded the act to encompass discrimination by public employers such as defendant. Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972). An E.E.O.C. guideline interprets the statutory ban on sex discrimination as specifically requiring that:

> policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

29 C.F.R. § 1604.10(b). This is precisely what plaintiff asks that defendants do. Thus, the applicable substantive law, if this guideline is valid, supports plaintiff's motion. Defendants, however, argue that there are several reasons why they should prevail.

First, defendants argue that the E.E.O.C. guideline quoted above is invalid, because it was "promulgated without statutory authorization." This argument is based on the fact that 42 U.S.C. § 2000e-12 only authorizes the Commission to promulgate "procedural regulations." The Supreme Court, however, has already ruled that substantive guidelines issued by the E.E.O.C. are not only proper, but they are entitled to "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971). Next, defendants argue that the guidelines are not in accord with the statutory provisions of Title VII. The E.E.O.C. has determined that it is discrimination on the basis of sex when employers treat pregnancy disability other than as a temporary disability. In view of the total absence of any substantial showing why this is an arbitrary conclusion, the court must defer to the E.E.O.C.'s view.

Thirdly, defendants suggest that they can defend this action on the basis of various provisions of state law. Plainly Title VII, as properly interpreted by E.E.O.C. guidelines, supersedes any inconsistent provision of state law. *See* 42 U.S.C. § 2000e-7; *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972).

A three-judge court is not necessary in this case, because, among other reasons, such a court is not required when a state law is unconstitutional for the reason that it conflicts with superior federal law. *See Swift & Co. v. Wickham,* 382 U.S. 111 (1968).

Defendants' final argument is that the court lacks jurisdiction, because plaintiff did not properly exhaust her administrative remedies. Plaintiff unquestionably filed a charge before the E.E.O.C. which, like the complaint in this case, alleges that plaintiff was the victim of sexual discrimination in that defendants would require her to take forced pregnancy leave and would deny her use of accumulated sick leave. It is irrelevant that defendants changed their policy since that charge was filed, and now they would apply a different, but still illegal policy, regarding forced pregnancy leaves.

Based on the foregoing, the court concludes that plaintiff's motion for summary judgment must be granted on the basis of Title VII. Plaintiff also argues that her motion is supported by 42 U.S.C. § 1983. Because it is important to the class action motion, the court also considers this alternate claim.

As discussed in the court's previous order, the § 1983 claim is valid only as to defendant Snodgrass. Before he can be required to respond to plaintiff's claim for damages, it must be shown that he personally acted to violate her civil rights. *See Hesselgesser v. Reilly,* 440 F. 2d 901 (9th Cir. 1971). At the present time, this has not been proven. Therefore, summary judgment cannot be granted on the basis of this claim. Moreover, the question whether § 1983 is

violated by a forced-leave policy such as that involved here is presently pending before the Supreme Court. *See Cleveland Bd. of Education v. LaFleur* and *Cohen v. Chesterfield City School Bd.,* 41 U.S.L.W. 3569 (S. Ct. Apr. 23, 1973). Thus, even if the necessary facts were established, the court might deem it inadvisable to enter summary judgment at this time.

2. *Class Action Certification:*

Plaintiff seeks to have this action certified as a class action brought on behalf of all female employees of the defendant district who have been or will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees. Defendants argue that this is not an action properly maintainable as a class suit. The court agrees with defendants that retroactive class relief would be improper, but it believes that prospective class relief should be entered.

The reason that the court will not certify the action as to retroactive payment of benefits is that it does not appear that the number of persons involved is so large that joinder would be impracticable. *See* Fed. R. Civ. P. 23(a)(1). Most members of the proposed retroactive-benefits class could not present Title VII claims within the limitations period. *See Mather v. Western Air Lines, Inc.,* 42 U.S.L.W. 2005 (C.D. Cal. 1973). The number of persons with valid Title VII claims appears to be less than a dozen. While others might have valid § 1983 claims, the court does not believe that plaintiff, who can obtain relief pursuant to Title VII, is an appropriate representative of that

class. Additionally, the court agrees with defendant that plaintiff's claim, as presented throughout these proceedings, is typical only of persons affected by defendants' policy relating to permanent certified employees. This further reduces the size of the would-be class. Finally, each class member's claim would involve separate questions of fact regarding how long she was forced to take leave, how long she was medically unable to work, and how long she remained away from work for the sole purpose of caring for her new baby. Making these determinations retroactively would present such complex factual issues that it cannot be said that common issues of law and fact predominate as Rule 23(b)(3) requires.

A different case, however, is presented as to the class on whose behalf plaintiff seeks prospective relief. Such a group would encompass all of defendants' present and future female permanent certified employees who could become pregnant, a group so numerous that joinder would be impracticable. Since no damages are sought on behalf of this group, all questions of fact and law are identical. Thus, this class satisfies the requirements of Rule 23 and it will be certified.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Ordered that:

(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery;

(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

(5) plaintiff's attorney shall submit an itemized request for reasonable attorney's fees; and

(6) plaintiff shall submit a judgment in accordance with the foregoing and local rule 123.

Dated, August 31, 1973

Alfonso J. Zirpoli
United States District Judge

United States District Court
For the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc., *Plaintiff,*

vs.

Richmond Unified School District, et al., *Defendants.*

[Filed Dec. 4, 1973]

JUDGMENT

The above-captioned matter came on regularly to be heard on the 20th day of August, 1973, before the Honorable Alfonso J. Zirpoli of the above-entitled court, pursuant to plaintiff's motions for summary judgment and to certify said action as a class action and pursuant to defendants' cross-motion for summary judgment. The court being fully advised in the premises, having reviewed all pleadings, papers and files on record the above-captioned matter, and the court having ordered that judgment be entered,

It Is Therefore Ordered, Adjudged and Decreed that:

(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is

designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery;

(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

(5) plaintiff's attorney shall be paid reasonable attorney's fees by defendants in the amount of $3,675.00;

(6) costs shall be awarded to plaintiff against defendants in accordance with plaintiff's memorandum of costs filed in accordance with Rule 124(e) of the Local Rules of this Court.

Dated, December 4, 1973

Alfonso J. Zirpoli,
United States District Judge

Appendix D

STATUTES INVOLVED

42 U.S.C. § 2000e - 2(a):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e - 5(b):

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent")

within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon

which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 2000e - 5(f)(1):

. . .

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under a subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action

may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

. . .

29 C.F.R. § 1604.10(b):

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

California Education Code § 13456:

The governing board of any school district shall provide for such leave of absence from duty as it deems appropriate for any female employee of the district who is employed in a position requiring certification qualifications and who is required to absent herself from her duties because of pregnancy or convalescence following childbirth, and shall adopt reasonable rules and

regulations prescribing the manner of proof of pregnancy, the point during the course of the pregnancy at which leave of absence shall be taken, and the length of time for which the leave of absence shall continue after birth of the child. Anything in Sections 13467 and 13469 to the contrary notwithstanding, the board may also provide in the rules and regulations whether leave granted under this section shall be with or without pay and, if with pay, the amount, if any, to be deducted from the salary due the employee for the period in which the absence occurs.

Nothing in this section shall be construed so as to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy.

The leave provided for in this section is in addition to any other leave provided for by law.

This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay.

California Education Code § 13456 (effective, January 1, 1976):

The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.

Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district.

Except as provided herein, written and unwritten employment policies and practices of any school district shall be applied to disability due to pregnancy or childbirth on the same terms and conditions applied to other temporary disabilities.

This section shall be construed as requiring the governing board of a school district to grant leave with pay only when it is necessary to do so in order that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury, or disability.

California Education Code § 13468:

Every person employed five days a week by a school district in a position requiring certification qualifications shall be entitled to 10 days' leave of absence for illness or injury and such additional days in addition thereto as the governing body may allow for illness or injury, exclusive of all days he is not required to render service to the district, with full pay for a school year of service. A certificated employee employed for less than five school days a week shall be entitled, for a school year of service, to that proportion of 10 days' leave of absence for illness or injury as the number of days he is employed per week bears to five and is entitled to such additional days in addi-

tion thereto as the governing board may allow for illness or injury to certificated employees employed for less than five school days a week; pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the school year. If such employee does not take the full amount of leave allowed in any school year under this section the amount not taken shall be accumulated from year to year with such additional days as the governing board may allow.

The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purposes of this section. Such rules and regulations shall not discriminate against evidence of treatment and the need therefor by the practice of the religion of any well-recognized church or denomination.

Nothing in this section shall be deemed to modify or repeal any provision of law contained in Article 3 of Chapter 6 of Division 3 of the Health and Safety Code.

The provisions of Section 13467 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any such employee five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board.

Appendix E

AFFIDAVIT OF MAXWELL THEBAUT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Maxwell Thebaut, being duly sworn, deposes and says:

1. I am a physician, licensed to practice medicine in the State of California. I am a specialist in the medical fields of obstetrics and gynecology, certified by the American Board of Obstetrics and Gynecology. I have practiced my medical specialty continuously since 1933 to the present excepting for four years during World War II. My offices are in Oakland, California.

2. I have been retained by the Richmond Unified School District to give my opinion respecting aspects of the employment of pregnant teachers during the late period of their pregnancy. In referring to "late pregnancy" I mean the six weeks prior to an estimated date of delivery.

3. In giving my opinion I have taken into account the following specific factors in addition to my experience, medical knowledge and general knowledge respecting schools and teachers:

a. That a teacher is usually required to maintain control and direction of approximately 30 active students.

b. That a teacher is usually required to remain with her class for periods of up to one hour without interruption.

c. That a teacher usually undergoes jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d. That a teacher is usually required to supervise student games and sports.

e. That a teacher is usually required to cope with minor emergency situations including but not limited to student fights, accidents, and illnesses.

4. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies. Common emergencies are:

a. placenta previa: sudden onset of severe bleeding;

b. placenta abruptio: premature separation of the placenta from the uterine wall;

c. rupture through the scar of previous caesarean operation;

d. breaking of the bag of water.

Emergencies of the kind described above commonly occur in up to 20% of all pregnancies, cannot be anticipated, are disabling, and require prompt medical attention.

5. In my opinion a teacher in late pregnancy is likely to be temporarily disabled or required to leave her class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies, some of which are:

a) urination—In virtually all pregnancies frequent and uncontrollable urination is required as a result of pressure by the foetus on the bladder.

b) incontinency—In approximately half of all pregnancies, incontinency is present or may be precipitated by sneezing, coughing, jumping, or like stresses.

c) false labor—In somewhat less than half of all pregnancies false labor occurs in the last month prior to delivery.

d) true labor—In all pregnancies, the time when true labor will begin cannot be predetermined absent induction of labor.

6. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her foetus:

a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises;

b. When she is required to supervise student games and sports;

and that such risk is greatly increased when such jostling and bumping or games and sports take place on stairways.

These risks exist because a woman in late pregnancy suffers an abnormal distribution of her body weight. As a result, women in late pregnancy are often awkward and uncertain when standing or walking. These

problems are magnified if inappropriate footwear is worn. Women in late pregnancy are peculiarly vulnerable to even modest elements of jostling and bumping that commonly occur in the movements of crowds of people and in the course of games and sports. Any of the conditions heretofore described could be precipitated by such jostling, bumping, or falling incident thereto.

7. In my opinion a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses.

The physical awkwardness that is present in late pregnancy will in most cases make it difficult for a teacher to respond in situations calling for sudden movement and exertion. Urination or incontinency could easily be precipitated by actions, such as bending or lifting, that she might be required to take. A teacher could easily become so disabled by her own movements or a minor blow, that she would be helpless to take any effective action.

8. It is my opinion that with respect to virtually all pregnancies an exact predictive date for delivery cannot be determined. Among the factors creating uncertainty with respect to the date of delivery are the following:

a) The term of a normal pregnancy is variable within a range of from 260 to 300 days from conception.

b) The date of conception is rarely ascertainable.

9. It is common practice in the medical profession to estimate a delivery date based upon Nagle's rule (266 days from conception) and an estimated date of conception. It is commonly recognized in the medical profession that such estimated dates are not exact and that delivery can be expected at any time from two weeks before to two weeks after a date so calculated.

10. In my opinion, considering a teacher of average stamina, health and normal pregnancy; a rule requiring her to stop working at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery.

11. In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology.

12. In the medical profession it is recognized that normal pregnancy is a natural condition and not an illness resulting from any injury, infection, malfunction or disfunction of the body.

13. It is my opinion that more than 85% of all deliveries are the result of voluntary pregnancies and that the proportion of voluntary pregnancies is increasing.

/s/ Maxwell Thebaut, M.D. (CR 50-54)

RICHMOND UNIFIED SCHOOL DISTRICT
INTERIM MATERNITY LEAVE POLICY

Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the foetus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.

Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement. (CR 45-46)